

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2018-364**

Stephen and Beverly Noller and)	
Michael and Nancy Halwig,)	
Complainants,)	
v.)	ANSWER
)	
Daufuskie Island Utility Co., Inc.,)	
Respondent.)	
_____)	

Daufuskie Island Utility Company, Inc. (“DIUC”) hereby answers the Complaint of Stephen and Beverly Noller and Michael and Nancy Halwig (together the “Customers”).

SUMMARY

The Customers own property located on Driftwood Cottage Lane, Daufuskie Island, South Carolina. DIUC provided the Customers water and sewer services until a hurricane destroyed Driftwood Cottage Lane and the DIUC infrastructure that allowed DIUC to service the Customers’ property. After the on-island property owners association, Melrose Property Owners Association (“MPOA”), rebuilt Driftwood Cottage Lane, DIUC re-installed infrastructure and resumed water and sewer service to the Customers.

In 2016 another storm, Hurricane Matthew, again washed out Driftwood Cottage Lane and the DIUC infrastructure in the utility easement adjacent to the roadway. Following Hurricane Matthew MPOA determined it was too risky to rebuild the roadway again. The decision provided to DIUC via email from MPOA stated:

The Melrose POA has made extensive efforts to protect and repair Driftwood Cottage Lane. Unfortunately the Atlantic Ocean has proved to be a force we cannot compete with. At this time, most of the road right of way and easement owned by the MPOA no longer exists – it is under water. The MPOA has utilized every reasonable option available to protect Driftwood Lane, but those options are limited by what the Ocean Coastal Resources Management agency will

allow. The only temporary protective devices allowed by ORCM are sandbags and sand backfill. After finally receiving an Emergency Permit for road protection, in the spring of 2015 we spent over \$60,000. installing heavy duty Geo sandbags and dumping tons of sand backfill to protect the road. The king tides of October 2015 washed most of that away and successive storms have completed the destruction and caused even further erosion. The MPOA cannot reconstruct or protect Driftwood Cottage Lane because it is not allowed to use the materials necessary to ensure any permanence to the effort.

Email, December 19, 2016, from Julie DiIullo, MPOA President, to Mike Guastella of DIUC.

DIUC consulted with ORS and understood that since its easement had washed into the sea, DIUC was not obligated to purchase additional easements to install for a third time infrastructure to serve these two customers. DIUC determined it would not be prudent to expend other ratepayers' funds to acquire a new easement and then reconstruct services to these homes; furthermore, the homes at issue lack any significant protection from erosion and equipment installed would not last very long at all before again being destroyed by erosion. However, the Customers were willing to pay for the cost of securing services, so the Customers and DIUC entered into a Customer Service Agreement ("CSA") whereby the Customers would bear all such costs.

Now that construction is complete, the Customers have decided they would prefer the ratepayers absorb the costs. So, the Customers refused to adhere to the CSA's provision requiring the Customers to pay DIUC its tax obligations and have asked this Commission to force DIUC to repay the Customers for the infrastructure the Customers volunteered to install themselves pursuant to the CSA. The claims in the Complaint are without merit and should be dismissed.

THE PROPERTY AT ISSUE

The following photographs taken December 9, 2018, demonstrate the unique circumstances at issue and the reasons a responsible utility would proceed cautiously with any expenditure for these at-risk properties.



Image 1(above) Halwig Residence, South Side. Image 2(below): Halwig Residence, North Side





Image 3(above): Noller Residence South Side. Image 4(below): Noller Residence North Side.



As shown in the photograph below, the abandoned homes to the immediate South of the Noller residence foretell the inevitable future of the Halwig and Noller properties.



*Image 5: Abandoned Properties Immediate South of Noller Residence
(formerly 29 and 33 Driftwood Cottage Lane)*

A current Google Earth image (below) shows Driftwood Cottage Lane now ends at Lot 22 and demonstrates that any effort by DIUC to obtain new easements and to install new lines, as requested by the Halwigs and Nollers, would only benefit the Halwigs and Nollers. Also shown are the posts that remain of two failed seawalls across the Halwig property (Numbered 42, 44, and 46). These failed attempts to combat erosion are also shown in Images 1 and 2 and further demonstrate the risk of installing lines to these properties.



Image 4: Driftwood Lane Destroyed

36 – Noller

42, 44, 46, 48 – Halwig

DISCUSSION

Following Hurricane Matthew, in order to connect service to the Noller and Halwig houses, a new utility easement would need to be acquired and then infrastructure designed and rebuilt; this would be a costly endeavor to benefit only two ratepayers whose service use was likely to be very short term. DIUC sought input from ORS. ORS did not take the position that DIUC was obligated to incur these expenses and ORS did not agree DIUC should pass these costs on to its other ratepayers. It would not have been a prudent decision for DIUC to voluntarily install lines to these two rapidly eroding properties and then attempt in its next rate proceeding to make all the other DIUC ratepayers absorb the cost.

DIUC reported to the Customers its determination regarding the feasibility, cost, and risk

of re-installing lines but the Customers nonetheless wished to obtain service. So, the Customers and DIUC negotiated then entered into a Customer Service Agreement (“CSA”) (copy attached to Complaint). DIUC provided ORS a copy of the negotiated CSA and discussed with ORS counsel that the CSA did not require any further ORS or Commission approval.

Pursuant to the CSA, the Customers would construct infrastructure that upon approval by DIUC could become part of the DIUC system allowing DIUC to serve the Customers. Some of the installed items would be on the Customer’s property and would remain under the Customers’ ownership and care.

The CSA contains the following relevant provisions:

1. In order to protect other customers from sharing in the cost responsibility, it would be the responsibility of the affected Customers to have the Project Mains installed.

The purpose of this provision was to prevent DIUC’s other customers from being forced to subsidize a third installation of infrastructure to the Customers’ property.

5. Upon Completion of the Project Main, Customers will provide DIUC with an acknowledged bill of sale transferring them to DIUC, and they shall be and remain the property of DIUC and its heirs and successors, and will be treated as contributed for rate setting purposes.

This provision specifically explains that the Customers and DIUC are agreeing the Project Mains will become the property of DIUC and they will be booked by DIUC as contributions in aid of construction. When a utility treats items “as contributed for rate setting purposes,” the utility incurs taxes. The Customers, then, are required to pay those taxes in this instance per Paragraph 1 of the CSA; otherwise, DIUC’s other customers would not be protected from sharing in the cost responsibility.

Pursuant to the Tax Cuts and Jobs Act (“TCJA”), DIUC will be required to pay taxes for the contributions in aid of construction related to the Customers’ contributions to the DIUC system.

Specifically, DIUC will incur a tax liability at a rate of \$33.24 for every \$100.00 of the amount booked as contributions in aid of construction. The amount taxed will include costs for the infrastructure as well as associated engineering and labor costs. The TCJA was in effect when the CSA was executed on January 30, 2018.

After construction was completed and DIUC received all the necessary documentation required by the CSA, counsel provided a document outlining the taxes due. Because counsel for the Customers had recently initiated an informal complaint with ORS, the document was intended to evidence the transaction was complete and that all conflicts between the Customers and DIUC had been amicably resolved. The document was captioned as “Addendum to Customer Service Agreement,” which the Customers appear to have perceived to be some sort of renegotiation of the CSA. That was not the purpose of the document, as explained by correspondence from DIUC counsel (copy attached hereto as *Exhibit A*).

DIUC has obtained necessary documentation to complete the transaction described in the CSA and invoices for the following costs associated with the Project Mains:

PINCO	\$ 69,337.72
Thomas and Hutton	\$ 39,346.35
Joe Davis	\$ 2,650.00
Sea Island Land Survey	\$ 1,300.00
SC DHEC	\$ 250.00
Transportation Costs	<u>\$ 70.00</u>
	\$ 112,954.07
Tax Rate	<u>33.24%</u>
Tax Due	\$ 37,545.93

DIUC provided the Customers with a statement from its legal counsel indicating that DIUC has incurred legal costs of \$3,900.00 related to the matters contained in the CSA. The legal fees are a cost to DIUC as part of the CSA and DIUC is not authorized to pass that cost on to its other customers.

Based upon the terms of the CSA and all the information available to date, the Customers are obligated to pay the tax obligation of \$37,545.93, which is equal to 33.24% of \$112,954.07, that DIUC must pay in taxes, plus reimbursement for DIUC legal fees in the amount of \$3,900.

As indicated in DIUC's communications with the Customers' counsel and filings in this matter, DIUC remains willing to cooperate with the Customers and to assist as it is able. However, DIUC is not at this time authorized to pass on to its ratepayers these costs attributable solely to the installation of the Project Mains for the Customers. To ensure its collection of these costs and to prevent DIUC's other customers from bearing the burden of the same, DIUC requires remittance per the CSA prior to activating service for the Customers.

DIUC consulted ORS after Hurricane Matthew and DIUC consulted with ORS regarding the Customer Service Agreement. DIUC has complied with the terms of its agreement with the Customers and DIUC has done its very best to proceed prudently in this situation. The Customers are contractually obligated to bear the costs they assumed under the CSA, which is a valid and enforceable agreement.

WHEREFORE, having answered the Complaint herein, Respondent DIUC asks that the claims against DIUC in this matter be dismissed and the Customers be instructed to comply with the terms of the CSA.

FURTHERMORE, in accordance with the Notice of Hearing and Testimony Submission Letter, both dated December 4, 2018, and filed in the docket of this matter, DIUC intends to present additional arguments and evidence in support of its positions.

Respectfully submitted,

s/ Thomas P. Gressette, Jr.

Thomas P. Gressette, Jr.

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December 17, 2018
Charleston, SC

EXHIBIT A

From: [Thomas P. Gressette, Jr.](#)
To: [Jack Smith](#)
Subject: RE: 46 & 36 Driftwood Cottage Lanes (Halwig and Noller Residences)
Date: Wednesday, October 31, 2018 2:35:00 PM

Jack,

Thanks for your letter. I apologize if I created confusion by the Addendum I recently forwarded. DIUC did not intend to change the Customer Service Agreement ("CSA"); my goal was just to assemble and identify all the various documents in one place for the parties. If there is a better way to handle the paperwork, I am certainly open to that.

DIUC does not want to alter the terms of the CSA. As we have discussed, DIUC cannot charge its other customers for the \$3,900.00 for legal costs and \$37,545.93 for taxes DIUC will incur for the Contributions in Aid of Construction. In order to protect other customers from sharing in the cost responsibility, as set forth in the CSA, the Halwigs and Nollers must bear that cost.

Best,

Tom

From: Margaret Marks <margaret.marks@nelsonmullins.com> **On Behalf Of** Jack Smith
Sent: Wednesday, October 31, 2018 1:52 PM
To: Thomas P. Gressette, Jr. <Gressette@WGFLAW.com>
Subject: 46 & 36 Driftwood Cottage Lanes (Halwig and Noller Residences)

Please see the attached letter.

Best,
Jack



NELSON MULLINS

Jack Smith

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EXHIBIT A

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